NO. 83-6318

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

JAMES FLOWERS
PETITIONERS

VERSUS

LOUISIANA,
RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF LOUISIANA

RESPONSE OF STATE OF LOUISIANA

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STATEMENT OF THE CASE

James Flowers' conviction of first degree murder and sentence to death were affirmed on appeal by the Louisiana Supreme Court. State v. Flowers, 441 So.2d 707 (La. 1983). He presently is seeking a writ of certiorari from this Honorable Court, alleging that he was denied the effective assistance of counsel at his trial and also on appeal, an issue which was never presented to the Louisiana courts, and is now being raised for the first time.

ARGUMENT

A. NO INADMISIBLE HEARSAY EVIDENCE OF AN ANONYMOUS TIP IMPLICATING FLOWERS IN THE CRIME WAS INTRODUCED AT HIS TRIAL

Petitioner's first argument is that he was denied effective assistance of counsel at his trial because his appointed attorney at that stage of the proceedings, Wiley J. Beevers, failed to object at two allegedly crucial moments--first, to the prosecutor's reference during his opening statement to an anonymous tip received by the Gretna Police Department, as set out below: (R. 594)

> No one actually witnessed this crime except the victim, who is no longer here to tell you about how she was brutually murdered

and the man, the person or persons who committed that crime.

Therefore, the State's case is entirely circumstantial. But the State will show that on October the 24th, at or around 4:10 P.M. based on an anonymous tip to the Gretna Police Department, Patrolman Glen Michel proceeded into the area of Madison and Hamilton, which is one block away from 1500 Jefferson Street, in Gretna, Louisiana, to check out a small while Chevette-type car where he was lead to believe that the driver would be an individual by the name of James Flowers.

He did so. A car was in the neighborhood. He stopped James Flowers. And in that car was evidence; was jewelry, costume jewelry and evidence that was taken from 1500 Jefferson Street, which belonged to Madeline Malmstrom.

He was taken to the Gretna Police Department. At the Gretna Police Department, a chain was taken from around his neck with a little emblem. That chain was Mrs. Malmstrom's. It matched a ring that was taken from the defendant's girlfriend, which he gave to the defendant's--which he gave to his girlfriend.

Later in the trial Officer Glen Michel testified thus: (R. 679-680)

Q. Did you detain James Flowers?

A. Yes sir, I did.

Q. Okay. Where was he detained?

A. I brought him to the Gretna Police complex, 200 5th Street.

Q. Okay. Why was he detained?

A. I took some jewelry out of a vehicle he was driving, that could possibly be involved in a murder that happened the day before at 1500 Jefferson Street.

Q. Okay. And how were you informed of the fact that he would be in the 1500 block of uh, or in the area of Jefferson--Madison?

A. I received a call over the police radio advising me that there was a black male subject named James Flowers driving a small white--either a Chevette I mean, Chevy or a Mercury, would be in the 1500 block, well the 1500 block area of Jefferson Street, and he's

possibly have some evidence involved in a murder homi--a murder/burglary that happened the day before.

Petitioner contends that defense counsel at trial should have objected to both the prosecutor's reference to an anonymous tip and to Officer Glen Michel's reference to the call over his police radio because, according to petitioner, both were inadmissible hearsay which "served to establish Flowers' identification and guilt, amounting to a deprivation of his constitutional right to confront witnesses, and to Sixth Amendment right to the effective assistance of counsel." Petition, p. 8. In support of this contention petitioner relies on Favre v. Henderson, 464 F.2d 359 (5th Cir. 1972), and Dalton v. Evans, 400 U.S. 71 (1970).

This argument is untenable in the respectful belief of the State of Louisiana. As this Court pointed out in Dalton v. Evans, supra, "The hearsay rule does not prevent a witness from testifying as to what he has heard; it is rather a restriction on the proof of fact through extrajudicial statements." 400 U.S., at 88. In Dalton this Court also observed that a statement may be placed before the jury though there is no confrontation of the declarant if the trier of fact has a satisfactory basis for evaluating the truth of the prior statement. 400 U.S., at 89.

In the case presently before the Court the anonymous tipster did not, as far as the jury heard, say, or intimate, that Flowers was guilty of Madeline Malmstrom's murder, or even place Flowers at the scene of the crime on that fatal night. All the unknown informant said was that at that particular moment--a day or so after the homicide--James Flowers was in a small, white car near the scene of the crime, and might have with him some evidence of the crime.

Further, these facts--that James Flowers on October 24, 1981, was in his car about a block from the site of the murder and had with him jewelry taken from the slain woman--were proven at the present trial by stong independent evidence. Thus, Officer Michel testified that on the afternoon of October 24 he found James Flowers stopped in his car at Cook and Madison Street, approximately one block from the Malmstrom residence, and that at that time Flowers was wearing, and had with him on the floorboard of his car, various pieces of jewelry which Officer Michel identified while testifying for the State. R. 677-680. And earlier in the trial Mrs. Florence Mullen, Madeline Malmstrom's sister and a person who saw her daily, identified the items of jewelry taken from Flowers' person and vehicle as having belonged to the slain woman. R. 648, 653-655.

The obvious reason defense counsel did not object to either the prosecutors's opening statement or Officer Michel's testimony is that it is well settled in Louisiana and other jurisdictions that a police officer can, without violating the rule against hearsay, testify that he took a particular action as a result of certain confidential information he had received, provided the officer does not testify concerning conclusions of the informer that the accused is guilty of the crime for which he is being tried. See State v. Turner, 392 So.2d 436 (La. 1981).

In the case presently before the Court the prosecuting attorney's statement and the testimony of Officer Michel here at issue were not offered to prove the truth of that information--this was established by direct evidence--but, rather, to show the reason why Officer Michel approached Flowers' car on October 24, when Flowers was found with the Malmstrom jewelry. Therefore, the prosecutor's opening statement and the testimony of Officer Michel were not hearsay, see State v. Turner, supra, and defense counsel at trial was wise not to raise an objection in either instance. Moreover, it was proven at the trial of this case, by eyewitnesses testimony subject to cross-examination, that two days after the murder of Madeline Malmstrom, James Flowers had jewelry which had belonged to her in his possession.

B) THIS CASE WAS FULLY BRIEFED BEFORE THE LOUISIANA SUPREME COURT

Counsel for petitioner is mistaken in believing that only one issue on behalf of Flowers was briefed in the Louisiana Supreme Court, thus denying him effective assistance of counsel on appeal. Although in her original brief filed in that court Martha Sassone, Flowers' appointed appellate counsel, briefed only one question, a few weeks prior to oral argument Ms. Sassone filed a supplemental brief in which she addressed, in great detail, six other arguments. This is not only a matter of record in the Louisiana Supreme Court, under docket number 82-KA-2621, but also is obvious from the opinion of the Louisiana Supreme Court affirming Flowers' conviction and sentence. See State v. Flowers, 441 So.2d 707 (La. 1983).

C. PETITIONER'S TRIAL COUNSEL WAS EFFECTIVE

Wiley J. Beevers, Esq., who represented Flowers at the trial of this matter, is a skilled professional advocate, R. 849, who has appeared as defense counsel in a number of murder cases. Prior to trial Mr. Beevers filed motions to suppress both Flowers' confession and the jewelry which had been seized from Flowers' car by Officer Michel.

R. 48. During the trial, the record of which runs to 967 pages, Mr. Beevers vigorously cross-examined witnesses, objected to the introduction of evidence, and argued Flowers' innocence to the jury.

A criminal defendant is entitled under the Sixth Amendment to representation by an attorney reasonably likely to render and rendering effective assistance of counsel. Hill v. Wainwright, 617 F.2d 375 (5th Cir. 1980); Rummel v. Estelle, 590 F.2d 103 (5th Cir. 1979); Carbo v. United States, 581 F.2d 91 (5th Cir. 1978); Herring v. Estelle, 491 F.2d 125 (5th Cir. 1974).

However, effective assistance is no equivalent to errorless counsel nor counsel judged effective by hindsight. Clark v. Blackburn, 619 F.2d 431 (5th Cir. 1980); Eastern v. Estelle, 609 F.2d 756 (5th Cir. 1980); MacKenna v. Ellis, 289 F.2d 592 (5th Cir.) modified, 289 F.2d 298, cert. denied, 368 U.S. 877,82 S.Ct. 121, 7 L.Ed.2d 78 (1961).

Rather, inquiry must be made into the totality of the circumstances surrounding counsel's performance to determine whether reasonably effective representation was provided. See, e.g., Lovett v. State of Florida, 627 F.2d 706 (5th Cir. 1980); United States v. Gray, 656 F.2d 881 (5th Cir. 1978); Lee v. Hopper, 499 F.2d 45 (5th Cir. 1974).

The State of Louisiana contends that in the matter presently before the Court Mr. Beevers effectively represented petitioner, and that new counsel's attack on his performance is totally lacking in support from the record of the present trial. Further, petitioner was well represented by Ms. Martha Sassone before the Louisiana Supreme Court.

CONCLUSION

The State of Louisiana respectfully asks this Honorable Court to deny James Flowers' petition for certiorari.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I certify that on this 16th day of [illegible], 1984, copies of the above and foregoing Response In Opposition To Writ Application has been served on Robert Glass, Esq., 338 Lafayette Street, New Orleans, La 70130 and Frank DeSalvo, Esq. and Michele Gaudin, Esq., 614 Tchoupitoulas Street, New Orleans, LA 70130 by depositing the same in the United States Mail, properly addressed and postage prepaid.

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